

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTEENTH REGION**

UPS FREIGHT, INC.

Employer

and

Case 17-RC-12497

ASSOCIATION OF PARCEL WORKERS
OF AMERICA

Petitioner

**REGIONAL DIRECTOR'S REPORT ON
OBJECTION AND RECOMMENDATIONS**

Pursuant to a petition filed on June 25, 2007, and a Stipulated Election Agreement, approved by the Acting Regional Director of the Seventeenth Region on July 5, 2007, an election was conducted on August 5, 6, and 7, 2007, in the agreed-upon unit.¹ The Petitioner timely filed objections to conduct affecting the August 2007, election, and the Petitioner's objections were consolidated with an outstanding Complaint and Notice of Hearing in Case 17-CA-23948, issued on November 16, 2007.

Thereafter, the parties executed an Agreement to Void and Set Aside Election and Conduct Re-Run Election, which was approved by the undersigned on November 29, 2007, pursuant to which a re-run election was conducted on February 17, 18, and 19, 2008, in the agreed-upon unit. The tally of ballots, made available to the parties at the conclusion of the February 2008 re-run election, showed that there were approximately three hundred and one (301) eligible voters, eighty-seven (87) of whom cast their ballots

¹ All full-time and regular part-time road and city drivers, dock workers, yard jockeys, OS&D clerks, building maintenance employees and operations clerks employed by the Employer from its 3800 Kansas Avenue, Kansas City, Kansas facility, but excluding all office clerical employees, tractor trailer and body mechanics, check bay attendants, tire changers, guards and supervisors as defined in the Act.

for the Petitioner and one hundred and nine (109) of whom cast their ballots against representation by the Petitioner. There were no void or challenged ballots.

On February 22, 2008, the Petitioner timely filed objections to conduct affecting the re-run election, copies of which were served upon the Petitioner by the Regional Director.² A copy of the Petitioner's Objections is attached as Exhibit 1.

Pursuant to Section 102.69 of the Board's Rules and Regulations, Series 8, as amended, the undersigned, after reasonable notice to all parties to present relevant evidence and to brief the issue raised by the Petitioner's remaining objection, has completed the investigation, considered the positions of the parties, and has prepared this report to be served on the parties. This report contains findings of fact and recommendations to the Board in Washington, D.C., as to the disposition of the issues, with such findings and recommendations made upon the entire administrative investigation.

The Objection

In its objection, the Petitioner asserts that the Employer did not post the NLRB election notices until Friday, February 15, 2008, although the election began on Sunday,

² On March 12, 2008, Petitioner requested to withdraw that portion of its objections, which alleged that the Employer disenfranchised voters by distributing a memo to employees setting forth polling times different than were agreed to by the parties and printed on the NLRB's Notice of Election. The Petitioner did not withdraw its objection, which stated the Employer did not post the NLRB's Notices of Election until February 15, which would be untimely posting under the Board's "3 Day Rule" set forth at Section 103.20 of the Board's Rules and Regulations. The Petitioner's withdrawal of its objection regarding the distribution of the memo is approved. The Petitioner's objections, which refer to the date the notices of election were posted, are sufficient to raise as an objection the issue of the timing of the posting of the Election notices.

February 17, 2008, at 9:30 p.m.. Section 103.20 provides that the Board's official Notices of Election must be posted in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election and that the notices shall remain posted until the end of the election. Section 103.20 further provides that the term "working day" shall mean an entire 24-hour period excluding Saturday's Sundays, and holidays. Failure to post the election notices as required by Section 103.20 would mandate setting aside the election.

The Employer contends that its election notice posting was timely because it operates a non-traditional Tuesday through Saturday workweek. As such, the Employer admits that it posted the election notice between 6:00 a.m. to 7:00 a.m., on Wednesday, February 13, 2008. However, the Employer contends that by counting Saturday and Sunday, the election notices were posted for over 110 hours, and as such, under the Employer's standard weekly work schedule, the election notices were available to employees for three full work days prior to the election and the Employer thereby met the requirements of Section 103.20. The Petitioner argues that Section 103.20 is non-discretionary and that unless the notices were posted by 12:01 a.m. on Wednesday, February 13, they were untimely and the election must be set aside and re-run.

I recommend that the Petitioner's objection be sustained. The Employer's admitted evidence establishes that the Employer first posted the election notices in the employee break room between 6:00 a.m. and 7:00 a.m. on Wednesday, February 13. In order to adhere to the required posting under Section 103.20, the election notices would

have had to have been posted by 12:01 a.m. on Wednesday, February 13. Section 103.20 expressly excludes Saturdays and Sundays from the definition of the term “working day” and does not provide for an exception based upon an employee’s actual work schedule. According, the election notices were not timely posted, as defined by Section 103.20, and under Section 103.20(d), the re-run election must be set aside and a new election ordered.

Findings of Fact

The Employer’s Hub Manager Jeff Wry provided affidavit testimony concerning the Petitioner’s objection. Wry admitted that he received a letter from the Regional Office dated January 15, 2008, which set out the Board’s rules that the election notices be posted in conspicuous places at the Employer’s premises for at least three full working days prior to the date of the election, and which attached copies of the NLRB’s election notices for the Employer’s use. Wry testified that he received the January 15 letter, and attached notices at the end of January 2008. While the January 15 letter that Wry acknowledges receiving states that a copy of the Board’s “3 Day Rule” (three day rule) is attached, Wry testified that he did not recall seeing a copy of the Board’s three day rule attached to the January 15 letter. However, the January 15, 2008, letter was not the first time that the parties had been notified of the Board’s three day rule and provided with a copy of the rule. On June 25, 2007, the initial petition docketing letter, addressed to Jeff Rye[sic], referenced the three day election notice posting requirements and included a copy of the rule. Additionally, on July 5, 2007, a letter was mailed from this office to the parties, including Jeff Wry, forwarding a copy of the conformed stipulated election

agreement and the letter referenced the three day rule and attached a copy of the rule.

Any purported lack of knowledge of the three day rule by the Employer, who was repeatedly informed of the rule, provided copies of the rule, and was represented by legal counsel, is of no avail.

Wry acknowledged in his testimony that he is a manager at the facility where the election was to take place, and was the individual responsible for posting the election notices. Wry admitted that the first time he posted the election notices was between 6:00 a.m. and 7:00 a.m. on Wednesday, February 13, 2008, when he posted three election notices in the employee break room. While testifying that he did not know exactly when the election notices should be posted, Wry testified that when he posted the notices, there were still four days, including Saturday, before the start of the election on Sunday, February 17, 2008. Wry testified that the Employer runs a Tuesday through Saturday operation, and that the Employer is fully staffed on Saturdays. Additionally, Wry testified that the over the road operations from the Kansas City, Kansas facility operate on a 24 hour, 7 day a week schedule.

Analysis

The failure to comply with the election notice posting requirement set forth in Section 103.20 of the Board's Rules and Regulations requires that the election be set aside. *Terrace Gardens Plaza*, 313 NLRB 571 (1993); *Sugar Food*, 298 NLRB 628 (1990); *Smith's Food & Drug*, 295 NLRB 983 (1989). The language of Section 103.20 does not provide for any exceptions to the rule, for an investigation of whether the

employer's posting was in substantial compliance with the rule, or for an investigation of whether there was any effect on the election results. Instead, the rule specifically states at 103.20(d), that failure to post the election notices as required by the rule "shall be grounds for setting aside the election."³ A new election is required even in cases where the employer acted in good faith and complied "substantially," but not "fully," with the requirements of Section 103.20. *Smith's Food & Drug*, id at 983-984. "Thus, any late posting of the election notices by the Employer, even by minutes, necessitates that the election results be set aside and that a new election be ordered." *Sara Lee Bakery Group*, 342 NLRB 146 (2004).

I am not persuaded by the Employer's argument that its Tuesday through Saturday work schedule mandates a different result because the notices were posted for more than three "working days" and for 110 hours prior to the election, if the Saturday and Sunday posting hours are considered. The issue of application of Section 103.20 when an employer utilized alternate work schedules was directly addressed by the Board in *Ruan Transport Corp.*, 315 NLRB 592 (1994), a case remarkably similar to the instant case. In *Ruan*, the employer, also a trucking operation, posted its election notices on Thursday morning for a Monday election. In adopting the Regional Director's findings and recommendations, the Board addressed the employer's contention that it operated 7

³ In fact, the final version of the rule specifically modified a previously proposed version that simply implied that a failure to post would constitute objectionable conduct. See Explanatory Statements in Section 103.20 of the Board's Rules and Regulations, 52 Fed. Reg. 25213-01(July 6, 1987).

days a week, and that as such, Saturdays and Sundays are work days, which if counted would satisfy the three day rule. The Board in *Ruan* detailed that during the Board's Section 103.20 rule making process, it had been suggested that different industries where employees worked other than a normal 5-day work week should be considered in determining the timing of election notice posting. As reported by the Board in *Ruan*, the Board rejected consideration of alternate work schedules in its rule-making because it did not want to complicate the rule by having different posting requirements for different industries. *Ruan*, id at 592, citing 52 Fed. Reg. 25213 (1987). The Board in *Ruan* concluded:

Thus, we cannot agree with the Employer that the Board left open for later consideration, and litigation, whether Saturdays, Sundays, and holidays should be considered "working days" within the meaning of Section 103.20(b). This is precisely the type of litigation that the Board sought to foreclose by enacting Section 103.20. *Ruan*, id at 592-593.

The Board's consistent rulings hold that consideration of the work schedules of employees and whether employees were sufficiently exposed to the election notices is not relevant. *Club Demonstration Services*, 317 NLRB 349, fn 6 (1995).

The Employer's claim that *Cleveland Indians Baseball Co.*, 333 NLRB 579 (2001); *Penske Dedicated Logistics, Inc.*, 320 NLRB 373 (1995); and *Maple View Manor, Inc.*, 319 NLRB 85 (1995), require a different result is mistaken. In fact, in *Cleveland Indians Baseball Co.* and

Penske Dedicated Logistics, Inc., both employers posted the election notices in conformance with Section 103.20. In those cases, the Board adhered to a bright-line test, again repeating its long held finding that the Board will not look into the schedules of the employees involved when determining posting times under Section 103.20, but instead, will look solely at whether the employer posted the notices for three full work days before the start of the election, excluding Saturdays, Sundays and holidays. As the Board stated in *Cleveland Indians Baseball Co.*, *supra* at 579:

...[T]he Board does not define “working day” depending on the individual circumstances of a particular employer or industry or on the working schedules of individual employees, but rather consistently adheres to the precise and literal definition given in the Board's Rules and Regulations. See, e.g., *Penske Dedicated Logistics*, 320 NLRB 373 (1995) (finding that the posting requirement was met when the notices were posted for at least 3 “working days” before the election even though 36 percent of the unit employees only worked on weekends and the posting area was locked off from employee access on the Sunday before the election).

Finally, in *Maple View Manor*, the Board refused to review the Regional Director’s refusal to set aside an election where the Employer failed to post the election notices a few hours shy of the requirements of Section 103.20, but did so based on evidence that the Employer-favored Intervenor Union’s objections to the untimely notice posting were filed in collusion

with the Employer, who was otherwise estopped from filing objections concerning its own failure to post. The Regional Director reasoned that setting aside the election in such circumstances would encourage collusion and would not serve the employees' interests. *Maple View Manor, Inc.*, supra at 85-86. As such, the Board's holding in *Maple View Manor, Inc.*, is not applicable to the situation in the instant case.

In conclusion, where the timing of the posting of the election notices by Hub Manager Jeff Wry was admittedly not in conformance with the edicts of Rule 103.20, I recommend that the Board adopt my findings and analysis and order that the re-run election results be set aside and a new election be directed. Thus, while the election notices were posted only a few hours less than the requirements of Section 103.20, I have no discretion in this matter. The election notices had to be posted at 12:01 a.m. on February 13, 2008, and it is admitted by the Employer that they were not. As such, the Petitioner's objection must be sustained and the election set aside.

Recommendation

IT IS RECOMMENDED that the Board sustain the Petitioner's objection, where it is undisputed that the election notices were posted between 6:00 a.m. and 7:00 a.m. on Wednesday, February 13, which is untimely under Section 103.20 of the Board's Rules and Regulations.

IT IS FURTHER RECOMMENDED that the Board set aside the results of the second election and direct a third election in the unit stipulated by the parties to be appropriate.^{4 5}

Dated: March 24, 2008

Respectfully submitted,

/s/ **Daniel L. Hubbel**

Daniel L. Hubbel, Regional Director
National Labor Relations Board, Region 17
8600 Farley Street- Suite 100
Overland Park, Kansas 66212-4677

⁴ Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, D.C. Exceptions must be received by the Board by April 7, 2008. Under the provisions of Section 102.69(g) of the Board's Rules, documentary evidence, including affidavits, which a party has timely submitted to the Regional Director in support of its objections, and which are not included in the Report, is not part of the record before the Board unless appended to the exceptions or opposition thereto that the party files with the Board. Failure to append to the submission to the Board copies of evidence timely submitted to the Regional Director and not included in the Report shall preclude a party from relying upon that evidence in any subsequent unfair labor practice proceeding.

⁵ In the Regional Office's initial docketing correspondence dated June 25, 2007, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board web site at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-File your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.